92-1796

Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DORSEY A. SANDERS, III

Petitioner

v.

STATE OF FLORIDA,

Respondent

Petition For Writ of Certiorari to the Florida District Court of Appeal, Fifth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether admission of directly incriminating hearsay confession by a co-defendant made after the crime, violates the Confrontation Clause of Amendment VI, United States Constitution and the Due Process Clause of Amendment XIV, United States Constitution as stated by *Bruton v. United States*, 391 U.S. 123 (1968).

2. Whether the trial court's failure to give the Petitioner's requested instruction on the "independent acts" defense denied Petitioner of his due process right to a fair trial under Amendment XIV to the United States Constitution.

STATEMENT CONCERNING THE PARTIES

All parties to the proceedings before the Court of Appeals are named in the caption.

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OPINIONS BELOW

The opinion of the Court of Appeals in the underlying cause is set out in the Appendix to this petition at A1.

The Order of the Court of Appeals denying Petitioner's motion for rehearing is set out in the Appendix in the Appendix at A3.

JURISDICTION

The opinion of the Court of Appeals (A1) was entered on January 8, 1993. Petitioner filed a timely motion for rehearing on January 22, 1993. The Court's Order (A3) denying the motion for rehearing was entered February 10, 1993. This Petition therefore is timely. Rule 13.

CONSTITUTIONAL PROVISIONS

Amendment VI, Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;. . .

Erratum to Jurisdiction Statement

The Jurisdiction to review the judgment in question is conferred on this Court by 28 U.S.C. § 1257(a).

Amendment XIV, Section 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protecton of the laws.

STATEMENT OF THE CASE

On July 22, 1991 a Florida jury convicted Petitioner of four counts of first degree murder as a constructive principal and one count of conspiracy to commit murder. Petitioner was found not guilty by the jury of soliciation to commit murder.

Petitioner was sentenced to four consecutive life sentences on the murder counts, each sentence having a mandatory, minimum term of twenty-five years not subject to reduction or parole under Florida law. Petitioner was also sentenced to 10 years, to run concurrently, for conspiracy to commit murder.

Petitioner, aged 33 at the time of these events, is the eldest son of Dr. Dorsey Sanders, Jr., a retired Gainesville, Florida veterinarian. The prosecution contends that in the summer of 1990 Dr. Sanders, Jr. hired a Melrose, Florida resident, John Barrett, to kill Dr. Sanders, Jr.'s former wife. The alleged motive was to thwart a divorce property order between Dr. Sanders, Jr. and his former wife.

The prosecution produced evidence at trial that John Barrett killed four people in the Floral City, Florida house of the former wife while she was absent. The victims were wholly unrelated to alleged conspiracy. John Barrett was arrested in Ohio four days after the murders.

The prosecution maintained that Petitioner's motive to kill his father's former wife -- Petitioner's natural mother -- was to preserve Petitioner's one-third remainderman interest in 40 acres of agricultural land in Melrose, Florida, in which Dr. Sanders, Jr. owns a life estate and each of his three sons own undivided one-third remainders.

The evidence against Petitioner at trial was wholly circumstantial except for hearsay statements made by John Barrett after the killings and while Barrett was in flight from law enforcement. In those statements Barrett confessed to two people that Barrett committed the murders and claimed he was hired by Petitioner and one Scott Burnside.

At trial the state court admitted over defense objections the two hearsay statements by John Barrett that directly incriminated Petitioner. John Barrett, who was in custody awaiting his trial, did not testify, nor did the trial court inquire into his availability to testify.

One state witness, John Barrett's common-law wife, testified under a grant of immunity from prosecution that John Barrett had directly incriminated Petitioner after Barrett committed the murders. The court overruled defense objections and held the testimony admissible hearsay within a co-conspirator hearsay exception.

A second State witness testified over defense objections that John Barrett told him that he (Barrett) had killed four people in Florida after being contracted to kill one. Again, the court ruled the testimony was admissible hearsay, this time finding that the testimony fell within the declaration against penal interest hearsay exception.

The prosecution compounded the prejudice of admitting John Barrett's incriminating statements by stating before the jury: "And that Mr. Barrett was the person identified as being in that house, having confessed to that crime." Defense counsel objected and moved for mistrial. The trial court denied the motion and instead read a cautionary instruction to the jury.

Finally, the defense requested a jury instruction on the theory of "Independent Acts." The defense based its request on testimonial evidence which showed that Petitioner was isolated from the other co-conspirators and that the four people who were killed were not the target of the alleged conspiracy. Petitioner's requested instruction was:

> If the Defendant does not participate in the actual criminal act and if that criminal act was outside of and foreign to either the original criminal plan or motive, then that original criminal plan or motive cannot be used to implicate the Defendant in the criminal act in question.

The trial court refused to read the requested jury instruction on independent acts.

Petitioner's appellate counsel expressly raised the issues contained in this Petition in briefs and oral argument before the Florida District Court of Appeal, Fifth District. That court denied Petitioner's direct appeal, ending Petitioner's ability to further appeal in Florida state court.

REASONS FOR GRANTING THE WRIT

1. Question 1 above stated: Whether admission of directly incriminating hearsay confession by a co-defendant made after the crime, violates the Confrontation Clause of Amendment VI, United States Constitution and the Due Process Clause of Amendment XIV, United States Constitution as stated by *Bruton v. United States*, 391 U.S. 123 (1968).

This Court should grant certiorari to declare that *Bruton v. United States*, 391 U.S. 123 (1968) remains controlling law after *Bourjaily v. United States*, 483 U.S. 171 (1987).

Lower federal and state courts have inconsistently applied the *Bruton* holding after this Court's decision in *Bourjaily*. The *Bruton* decision was not overruled by *Bourjaily*, but is compatible with *Bourjaily* under this Court's Sixth Amendment jurisprudence.

The keystone of the Sixth Amendment Confrontation Clause is protecting the reliability of the trial fact-finding process. *Ohio v. Roberts*, 448 U.S. 56, 64 (1979). The reliability of hearsay statements by declarants not confronted or cross-examined at trial can be inferred when the hearsay statement falls within a firmly established exception of a state's evidence code. *Ohio*, 448 U.S. at 66. Hearsay statements can also show reliability when particular indicia of trustworthiness are present. *Id.*

This Court distinguished as presumptively unreliable the separate category of co-defendant hearsay statements that directly incriminate another co-defendant. *Bruton v. United States*, 391 U.S. 123, 135-136 (1968); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965).

This Court distinguished co-defendant statements because of their inherent unreliability: "once partners in a crime realize the 'jig is up' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Lee v. Illinois*, 476 U.S. 530, 544-545 (1986). *Accord, United States v. Inadi*, 475 U.S. 387, 395 (1986). Co-defendant confessions not subject to cross-examination also interfere with trial integrity and reliability because they devestate a defendant's credibility and overwhelm a jury's factfinding ability. *Cruz v. New York*, 481 U.S. 186, 190 (1987).

Bourjaily did not overrule *Bruton* but identified co-conspirator statements not directly inculpatory of a co-defendant made during the course and in furtherance of an ongoing conspiracy as a firmly rooted hearsay exception. *Bourjaily v. United States*, 483 U.S. 171, 183 (1987). In *Bourjaily* other independent evidence proved guilt. *Bourjaily*, 483 U.S. at 181.

This Court continues to distinguish the special category of co-defendant statements after the *Bourjaily* decision. In *Idaho v. Wright* this Court identified *Bruton* as a special class: "The Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. *See e.g., Green . . . Bruton v. United States . . . Barber v. Page . . . Pointer, supra.*" *Idaho v. Wright*, 497 U.S. ___, 110 S.Ct. 3139, 3146 (1990). Other courts have not properly recognized this distinction.

Both the lower federal courts and the state supreme courts apply *Bruton* inconsistently following *Bourjaily*. Some lower federal courts have affirmed the vitality of *Bruton*. *See e.g., United States v. Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991). Conversely, other federal courts have held *Bourjaily* overruled

Bruton. *See e.g., United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992).

State supreme courts show similar confusion. The Supreme Court of Washington interpreted the Sixth Amendment under *Bruton* to absolutely prohibit admission of incriminating co-defendant statements. *See e.g., State v. St. Pierre*, 759 P.2d 383 (1988). Other state supreme courts have expressly held that *Bourjaily* overruled the *Bruton* decision. *See e.g., Taylor v. Commonwealth*, 821 S.W. 2d 72 (Ky. 1992).

Based on this confusion, the Florida court erroneously admitted the directly incriminating confessions of John Barrett. Because the confessions were made after the murders and conspiracy end and a declaration against penal interest is not a firmly rooted hearsay exception under Florida law, *Bruton* still applies. *Maugeri v. State*, 460 So. 2d 975, 978 (3d DCA 1984), *cause dismissed*, 469 So. 2d 749 (Fla. 1985).

The Florida District Court of Appeals decision that the *Bruton* error did not require reversal is in error and requires review by this Court.

2. Question 2 above stated: Whether the trial court's failure to give the Petitioner's requested instruction on the "Independent Acts" defense denied Petitioner of his due process right to a fair trial under Amendment XIV to the United States Constitution.

This Court has held that a criminal defendant is entitled to an instruction of any recognizable defense where there is evidence to support that defense. *Mathews v. United States,* 485 U.S. 58 (1987); *Stevenson v. United States,* 162 U.S. 313 (1896).

The Florida Supreme Court recognizes the defense of independent acts outside an alleged conspiracy. *E.g., Bryant v. State,* 412 So. 2d 347 (Fla. 1982). Petitioner was entitled to have the instruction read, if there was evidence sufficient for a reasonable jury to find in the Petitioner's favor. *Mathews,* 485 U.S. at 63.

Ample evidence was presented at trial which supported Petitioner's theory that the killings were an independent act of Barrett. The Petitioner was isolated, both physically and communicatively, from the other co-conspirators whenever they discussed the plan. And further, the very act of killing four people, who were not the target of the plan nor in any way related to the original motive of the conspiracy, is persuasive evidence that Barrett acted independently, outside the scope of the conspiracy.

Except for the incriminating hearsay statements that were admitted over defense objections, Petitioner was convicted by wholly circumstantial evidence. Of the instructions read, none related the Petitioner's theory of the "independant act" defense.

Furthermore, the instruction read on the elements of conspiracy did not introduce the defense's theory to the jury.

The Florida District Court of Appeals decision that failure to read the requested instruction was not a violation of Petitioner's 14th Amendment right is in error and requires review by this Court.

CONCLUSION

This Court should issue the Writ for review of the questions presented above.

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Order Denying Motion for Rehearing A3

IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF FLORIDA
FIFTH DISTRICT - JULY TERM 1992

No. 91-1868

DORSEY ADDREN SANDERS, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court for Citrus County, John P. Thurman, Judge

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FILED JANUARY 8, 1993

ORDER:
PER CURIAM.
AFFIRMED.

/s/ John P. Thurman
Circuit Court Judge

SHARP, W., and PETERSON, JJ., concur.

GRIFFIN, J., concurs specially, with opinion.

GRIFFIN, J., concurring specially.

In my view, admission of the "wallet from heaven" was error; however, after reviewing the trial transcript, including closing arguments, I conclude the error does not warrant reversal.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA - FIFTH DISTRICT

No.: 91-1868

DORSEY ADDREN SANDERS, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

/

FEBRUARY 10, 1993

ORDER:

ORDERED that Appellant's Motion for Rehearing En Banc, filed January 22, 1993, is denied.